

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC)	
Separate Affiliate and Related)	WC Docket No. 02-112
Requirements)	
)	
2000 Biennial Regulatory Review)	
Separate Affiliate Requirements of Section)	CC Docket No. 00-175
64.1903 of the Commission's Rules)	
_____)	

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**REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),¹ through the undersigned and pursuant to Federal Communications Commission (FCC or Commission) Rules 1.415 and 1.419,² hereby submits its reply comments in response to the *Further Notice*³ in the above-docketed proceedings.

INTRODUCTION AND SUMMARY

Despite the numerous and lengthy comments filed in this proceeding, no commenter has provided any justification to continue the separate affiliate requirements for independent incumbent local exchanges carriers (IILECs) or to regulate IILECs and Bell Operating Companies (BOCs) (collectively ILECs) as dominant if and when they provide integrated local

¹ USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² 47 C.F.R. §§ 1.415 and 1.419.

³ *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements and 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the*

and long distance services. As USTA previously commented in this proceeding, the appropriate regulatory classification for IILECs and BOCs providing long distance services, whether provided through a separate affiliate or through an integrated structure, is nondominant. USTA addresses below the comments of competitive local exchange carriers (CLECs), interexchange carriers (IXCs), wireless carriers, user groups, and state regulators that have advocated that IILECs and BOCs should continue to be subject to separate affiliate requirements, dominant carrier regulation of long distance services provided on an integrated basis with local services, and imposition of alternative regulatory requirements. In sum, USTA maintains that increases in rates for deregulated special access services when the market for those services has been found to be open to competition is not a reason to impose dominant carrier regulation; that any claims of cross-subsidization of long distance service rates with local service rates should be handled as complaints, but they are not a basis for imposing dominant carrier regulation; that BOCs' growth in their share of the long distance market is not indicative of market power or the ability to exercise market power and thus not a basis for imposing dominant carrier regulation; that intermodal competition for voice services is strong and specifically that wireless, cable telephony, and Internet telephony platforms provide substitutable voice services for the same services provided over the traditional wireline platform, which is further evidence that dominant carrier regulation should not be imposed; and finally that safeguards and enforcement tools are provided for in the Communications Act of 1934, as amended, to protect against discrimination and anti-competitive behavior by carriers.

Commission's Rules, WC Docket No. 02-112 and CC Docket No. 00-175, FCC 03-111, Further Notice of Proposed Rulemaking (rel. May 19, 2002) (*Further Notice*).

DISCUSSION

I. There is no evidence that would support continuation of separate affiliate requirements or imposition of dominant regulation for carriers providing integrated local and long distance services

The focus of this proceeding is whether IILECs and BOCs can leverage their dominance and alleged market power⁴ in the local and exchange access markets to obtain market power in the long distance market. None of the commenters have demonstrated that there is any need to continue subjecting IILECs to separate affiliate requirements⁵ or that IILECs or BOCs can leverage any advantage from their position in the local and exchange access markets to obtain market power in the long distance market. The commenters objecting to the removal of separate affiliate requirements and to the application of non-dominant regulation to ILECs that provide integrated local and long distance services have expressed many complaints about BOCs and IILECs – complaints about increases in special access rates, cross subsidization of long distance services by local services, rapid increases in long distance market share, and lack of substitutable services for wireline voice service – as justification for retaining separate affiliate requirements or imposing dominant regulation or alternative regulations, but they have engaged in nothing more than theoretical arm waving without offering any proof or relevance of their claims and arguments. Without more – and USTA believes there is not more – there is no justification to

⁴ While many commenters allege that the IILECs and BOCs have market power in the local and exchange access markets, USTA does not accept, and the Commission should not accept, these allegations as truth. USTA previously commented on the ease with which customers can and do bypass ILEC local and exchange access facilities and services, using wireless, cable telephony, and Internet telephony services offered by ILEC competitors. *See* USTA Comments at 6-8. In addition, the ability of customers to obtain special access services from non-BOC alternative sources has led the Commission to find that the special access market is competitive and to grant BOCs pricing flexibility with regard to their offering of those services.

⁵ Notably, Section 272(f) provides for the eventual sunset of BOCs' separate affiliate requirements, but there is no similar provision for IILECs.

retain any separate affiliate requirements for IILECs or to apply dominant regulation to IILECs and BOCs (after BOCs' Section 272 separate affiliate requirements sunset) if and when they provide local and long distance services on an integrated basis.

Many commenters argue that deregulation of special access services provided by BOCs, which permitted pricing flexibility for these services, has resulted in increased rates⁶ for these exchange access services.⁷ Further, they claim that pricing flexibility has removed the protections offered by price cap regulation⁸ and they seek to reverse the deregulation implemented by the Commission despite the Commission's findings that the special access market is open to competition and that competitive alternative sources of special access services are available.⁹ However, an increase in rates for deregulated special access services is not a reason to impose dominant carrier regulation on BOCs that provide integrated local and long distance services. If the Commission finds that a market is open to competition – and the Commission has found that the special access market is open to competition by granting BOCs pricing flexibility – then market forces must be allowed to operate. In a competitive market, prices rise and fall according to what consumers are willing to pay for a certain good or service. Thus, any increase in the rates charged by BOCs for deregulated special access services must mean that either the rates were previously too low and the market will bear higher rates or that

⁶ Moreover, these commenters argue BOCs still have an incentive to charge and do charge special access rates that are above cost. *See* AT&T Comments at 32 and MCI Comments at 18.

⁷ *See* AT&T Comments at 4, 7, and 31; MCI Comments at 17; AT&T Wireless Comments at 14, and Ad Hoc Comments at 4.

⁸ *See* MCI Comments at 17.

⁹ *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice

BOCs' competitors can take advantage of the BOCs' increased rates and win customers away from the BOCs by offering lower competitive rates for the same services.

In addition to complaints that special access rates have risen, one commenter complains that BOCs offer their long distance services at rates that are less than what they charge for switched access.¹⁰ Moreover, other commenters complain that without the imposition of separate affiliate requirements on BOCs and IILECs, competitors and regulators would be unable to discern whether BOCs and IILECs were engaging in predatory pricing by offering long distance services below cost and subsidizing their long distance services with their local services.¹¹ With regard to both of these complaints, it should be clear that the BOCs and IILECs simply do not have the ability to do what the commenters suggest is occurring or what they predict may happen. Rates for local, exchange access (including special access and switched access), and long distance services are public information. In some cases they are regulated rates and available through the Commission and state regulatory agencies. In other cases they are unregulated rates, but they are available on company web sites. In all cases, the information to substantiate these commenters' complaints is available to the public. Yet, no credible, detailed proof has been offered, which would enable the Commission to conclude that BOCs or IILECs offer long distance services below their access rates. Generally, access rates have been driven down by the Commission.¹² By definition, access rates that are currently on file with the

of Proposed Rulemaking, CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63, 14 FCC Rcd 14221, ¶19 (1999).

¹⁰ See AT&T Comments at 26-30.

¹¹ See MCI Comments at 19-20, Texas Attorney General Comments at 1-2, Texas PUC Comments at 3, Working Assets Comments at 2, and Sage Telecom Comments at 28.

¹² See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1; Report and Order in CC Docket No. 99-

Commission and state regulatory agencies have been deemed just and reasonable. Nonetheless, if a competitor perceives access rates as too high, that competitor need only file a complaint with the Commission or the appropriate state regulatory agency. Despite the public availability of BOCs' and IILECs' local, exchange access, and long distance rates, the commenters have also not explained why the availability of such rate information would not enable them to discern whether or not long distance rates were being subsidized. The information that is necessary to file a complaint regarding subsidization is available. All a competitor need do is file a complaint with the Commission or the appropriate state regulatory agency if it believes that the rates charged by BOCs and IILECs for long distance services are too low and that cross subsidization has occurred.

Some commenters complain that BOCs have gained a significant share of the long distance market at an unprecedented rate.¹³ However, the long distance market share held by BOCs and IILECs, which market share is notably still a minority share, is not relevant to the issue at hand. Market share is not indicative of market power or the ability to exercise market power. "Use of market share as a proxy for market power has rightfully been criticized for ignoring other important market information such as the ability of competing firms to expand or

249; Eleventh Report and Order in CC Docket No. 96-45, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, 15 FCC Rcd 12962 (2000) (CALLS Order) and *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) (MAG Order).

¹³ See AT&T Comments at 4-5 and MCI Comments at 2.

of new competitors to enter.”¹⁴ Interestingly, the Commission even stated in its proceeding on *Competition in the Interstate Interexchange Marketplace* that “market share alone is not necessarily a reliable measure of competition, particularly in markets with high supply and demand elasticities.”¹⁵ In that proceeding the Commission found that AT&T had a market share of about fifty percent in business services and that level was not incompatible with a highly competitive market.¹⁶ Again, the issue in this proceeding is whether BOCs and IILECs have market power in the local market, which can be leveraged to their advantage in the long distance market. The underlying question is whether the market (either the local or the long distance market) is open to competition. Can competing firms expand and/or can new competitors enter? Without a doubt, both the local and long distance markets are open to competition. The Commission’s grant of Section 271 authority in 41 states and the District of Columbia is more than satisfactory evidence that local markets are open to competition. The Commission’s own data on the status of competition in the long distance market, which is without a doubt a market with high supply and demand elasticities, sufficiently shows that the long distance market is open to competition and in fact is fully competitive.¹⁷ Specifically, the Commission’s data shows that AT&T, MCI, and Sprint share 71 percent of the traditional wireline long distance market¹⁸ and that all other long distance companies have a combined share of less than 30 percent of that market, of which BOCs have only just over a 6% share.¹⁹ These figures do not

¹⁴ Krattenmaker, Lande, and Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Georgetown L.J. 241, 259 (1987).

¹⁵ *Competition in the Interstate Interexchange Marketplace*, Report and Order 6 FCC Rcd 21, 5880, 5890 ¶51 (1991).

¹⁶ *Id.*

¹⁷ See USTA Comments at 4.

¹⁸ See *id.*

¹⁹ See USTA Comments at 5.

take into consideration the amount of long distance voice services provided over wireless, cable telephony, or Internet telephony platforms. Interestingly, unlike the efforts of these commenters to subject BOCs to dominant regulation when they offer integrated local and long distance services, especially when BOCs only have a small but growing share of the long distance market, BOCs are not clamoring to regulate cable broadband service providers even though cable providers have the dominant share of broadband services provided to the mass market. Again, market share is not a determining factor in whether ILECs can exercise market power.

Many commenters also argue that voice services provided over wireless, cable telephony, and Internet telephony platforms are not sufficiently substitutable for wireline voice services, claiming that this intermodal competition is too small, too much in its infancy to have an impact on the dominance of BOCs and IILECs.²⁰ These claims are simply absurd in light of the technological advancements of and the manner in which consumers are increasingly using services provided over these alternative platforms. That the number of customers served over these platforms may be small or that the services provided over these platforms may be in their infancy is not relevant as to whether voice services provided over these platforms are substitutable for voice services provided over traditional wireline facilities. In fact, consumers can obtain voice services and calling features over these alternative platforms, which are directly comparable to voice services offered by BOCs and IILECs over their wireline facilities and consumers are increasingly substituting voice services provided over these alternative platforms for their traditional wireline voice services. A recent study by J.D. Power & Associates reports that the “number of consumers using wireless service exclusively for local calls increased to 3%

²⁰ See AT&T Comments at 16-17, Sage Telecom Comments at 9-15, VarTec Telecom Comments at 5, and Ad Hoc Comments at 4.

in 2003 from 2% in 2002.”²¹ Such substitution of wireless voice services for wireline voice services is likely to increase significantly when intermodal local number portability takes effect on November 24, 2003. Nine million respondents to a recent survey indicated that they would port their wireline number to a wireless carrier when intermodal portability is implemented.²² In addition to the growing substitution of wireless voice services for wireline voice services, similar substitution is expected from Internet calling, which is also predicted to grow significantly from about 100,000 households using Internet telephony today to about 4 million in 2007.²³ Such data and predictions show that the commenters have failed to demonstrate that voice services offered over alternative platforms are not substitutable for voice services offered over traditional wireline facilities.

With regard to the separate affiliate requirements currently imposed on IILECs, one commenter urged the Commission to retain these requirements arguing that the level of competition in the IILECs’ territories has not changed appreciably since the last time the Commission considered these requirements and that IILECs have a significant incentive to misallocate costs to their local exchange operations, inflating revenue requirements and ultimately resulting in increased access rates.²⁴ Another commenter notes that IILECs do not have the same ability to harm long distance competition as the BOCs, acknowledging that some IILECs do not even provide long distance services and that those that do often have relatively weak brands and marketing presence.²⁵ Yet, this commenter still believes there is a rational

²¹ COMMUNICATIONS DAILY, Wireline, July 16, 2003 at 9.

²² See USTA Comments at 7.

²³ See Paul Davidson, *Calling via Internet has suddenly arrived*, USA TODAY, July 6, 2003.

²⁴ See MCI Comments at 1 (incorporating by reference comments filed by WorldCom in CC Docket No. 00-175 on November 1, 2001). See WorldCom Comments at 1-2, 10-11.

²⁵ See AT&T Comments at 75.

basis for maintaining the IILECs' separate affiliate requirements until the Commission carries out reforms to remove all incumbents' access cost advantages and ability to engage in non-price discrimination, which basis is their claim that the separate affiliate requirements address the IILECs' different incentives and abilities.²⁶ Notably, Sprint disagrees with these commenters and states that "independent ILECs do not present the threat to long distance and local competitors . . . and therefore a separate affiliate requirement is no longer necessary in order to classify independent ILEC in-region interstate and international services as non-dominant."²⁷ Not only does USTA agree that IILECs offering integrated local and long distance services are not a threat to long distance competition, but USTA emphasizes that IILECs never were a threat. As USTA noted in its comments, prior to 1997 IILECs provided local and long distance on an integrated basis and there was no concern by the Commission then about the ability of IILECs to exercise market power in the long distance market.²⁸ Yet, when the Commission implemented the separate affiliate requirements for IILECs in 1997, it did so without any finding of actual anti-competitive conduct justifying the requirements and it did so without a mandate from Congress in the Act to implement the requirements (unlike the mandate in the Act that BOCs provide long distance services through a separate affiliate for a period of time). Moreover, when the Commission established the separate affiliate requirements for IILECs, it did so with no clear provision for their removal (unlike the Act's explicit provisions for sunset of the BOCs' separate affiliate requirements). There is no evidence that IILECs have exercised or can exercise market power in the long distance market. Accordingly, the Commission should immediately remove the separate affiliate requirements imposed on them.

²⁶ See *id.* at 76.

²⁷ See Sprint Comments at 3.

II. Safeguards already exist to protect against discrimination and anti-competitive conduct. Enforcement tools already exist to address discrimination and competition violations

There are numerous provisions in the Communications Act of 1934, as amended (Act) and many Commission regulations, which prohibit discrimination and anti-competitive behavior between carriers and which provide tools for enforcing these provisions of the Act and Commission regulations. Section 202 of the Act states a general prohibition against any carrier engaging in “any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service”²⁹ Sections 251(c) and (g) and Section 272(e) of the Act more specifically prohibit discriminatory access to network elements and discriminatory interconnection restrictions on exchange access, information access, and exchange services.³⁰ In addition, the Commission’s Part 64 (cost allocation) and Part 69 (tariff) regulations prohibit cost misallocations and provide a means to determine how costs have been allocated.³¹ Importantly, violations of these safeguards are enforceable under Sections 4(i), 201, 206, 207, 208, 209, and 503 of the Act.³² Finally, the Commission has ample authority under Sections 208, 211, 213, 215, 218, and 220 of the Act³³ to obtain information from carriers, which may relate to a complaint filed by a competitor. Like the safeguards and enforcement tools provided by the Act and Commission regulations, states and their regulatory agencies have similar safeguards and enforcement tools.

²⁸ See USTA Comments at 3.

²⁹ 47 U.S.C. §201.

³⁰ See 47 U.S.C. §§251(c), 251(g), and 272(e). Section 272(e) of the Act applies only to BOCs.

³¹ See 47 CFR Part 64, Subpart I and 47 CFR Part 69, Subpart A.

³² See 47 U.S.C. §§4(i), 201, 206, 207, 208, 209, and 503.

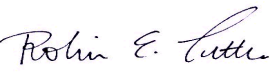
³³ See 47 U.S.C. §§208, 211, 213, 215, 218, and 220.

CONCLUSION

The local and long distance markets are open to competition. The Commission has sufficient data about the competitive status of these markets to find that the IILECs separate affiliate requirements should be eliminated immediately and that IILECs and BOCs that provide local and long distance services on an integrated basis should be able to do so on a non-dominant regulated basis. There is no evidence that would support continuation of separate affiliate requirements or imposition of dominant regulation for ILECs providing integrated local and long distance services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Meena Joshi, do certify that on July 28, 2003, the afore-mentioned Reply Comments of The United States Telecom Association was electronically mailed to the following parties.

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